



GYPSUM RESOURCES, LLC

185 IBLA 375

Decided June 10, 2015



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

GYPSUM RESOURCES, LLC

IBLA 2012-113

Decided June 10, 2015

Appeal from a decision of the Field Manager, Red Rock/Sloan (Nevada) Field Office, Bureau of Land Management, accepting a relinquishment of an access road right-of-way, and closing the right-of-way file. NVN-065968.

Affirmed.

1. Federal Land Policy and Management Act of 1976:  
Rights-of-Way–Rights-of-Way: Act of January 21, 1895–  
Rights-of-Way: Cancellation--Rights-of-Way: Federal Land Policy  
and Management Act of 1976

BLM properly accepts a relinquishment of a right-of-way, originally issued pursuant to section 1 of the Act of January 21, 1895, 43 U.S.C. § 956 (1970) (later conformed to a right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (2006)), and closes the right-of-way file, when the current holder of the right-of-way relinquishes its rights in the right-of-way. BLM properly deems the current holder to be the party presently holding the right-of-way, as a matter of record with BLM, not the current owner of title to private lands accessed by the right-of-way, which, unbeknownst to BLM, had passed by a series of deeds that transferred the lands, together with all “appurtenances.”

APPEARANCES: James H. Walton, Esq., and James A. Fontano, Esq., Las Vegas, Nevada, for appellant; Elizabeth A. Gobeski, Esq., and Kevin Tanaka, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Gypsum Resources, LLC (hereinafter, Gypsum) has appealed from a January 23, 2012, decision of the Field Manager, Red Rock/Sloan (Nevada) Field Office, Southern

Nevada District, Bureau of Land Management (BLM), accepting a March 18, 2005, relinquishment by BPB Gypsum, Inc. (BPB) of a road right-of-way (ROW), NVN-065968 (formerly, NEVADA 065968), which afforded access across public lands to private lands, and closed the ROW file.<sup>1,2</sup>

### *Background*

On October 1, 1965, BLM issued a decision granting ROW NVN-065968 to The Flintkote Company (Flintkote) for the construction, maintenance, and operation of a “Proposed Mine Road,” which provided access across public lands situated in sec. 13, T. 21 S., R. 58 E., and secs. 31 and 32, T. 21 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada, to a large block of private lands referred to as the “Mining Property” (hereinafter, Mine).<sup>3</sup> The ROW was originally granted, in perpetuity, pursuant to

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<sup>1</sup> The appeal was originally docketed by the Board as brought by James Hardie Gypsum, Inc., d/b/a BPB Gypsum, Inc., the party that filed the Mar. 18, 2005, relinquishment that resulted in BLM’s Jan. 23, 2012, decision, now challenged by Gypsum. We have since corrected the record to reflect that the appellant is Gypsum.

<sup>2</sup> In its Jan. 23, 2012, decision, the Field Manager accepted the relinquishment of two ROWs, NVN-025026 and NVN-065968, by BPB Gypsum, Inc., and closed the ROW files. In appealing, Gypsum challenged both terminations. By Order dated Apr. 16, 2012, we accepted Gypsum’s Mar. 26, 2012, partial withdrawal of the appeal, to the extent that it challenged acceptance of the relinquishment of ROW NVN-025026, and dismissed the appeal to that extent.

Thereafter, by Order dated July 9, 2012, we suspended consideration of the appeal, pending settlement negotiations by the parties. On Apr. 30, 2015, BLM informed us that the parties had been unable to reach a settlement, and that it desired the Board to adjudicate the merits of the appeal. We lifted the suspension, by Order dated May 1, 2015. On May 4, 2015, Gypsum confirmed the parties’ inability to reach a settlement, and joined in BLM’s request. The matter is now ripe for review.

<sup>3</sup> The ROW is 100 feet wide and a total of 3,382.81 feet long, encompassing a total of 7.766 acres of public land. It consisted of two segments, the first of which ran a short distance in a southeasterly direction across public lands in the southwestern corner of sec. 13, from State Route 159 to the southern boundary of the section, and the second of which ran a short distance in a southeasterly direction across public lands in the northeastern corner of sec. 31 and northwestern corner of sec. 32. See Land Exchange Parcels Map (“Exhibit B” attached to Mining Agreement) (Part of Ex. C attached to Statement of Reasons (SOR)); BLM ARCGIS Map (JHG ROWs). The ROW encompassed part of the access road to the Mine.

section 1 of the Act of January 21, 1895, 43 U.S.C. § 956 (1970), and its implementing regulations, 43 C.F.R. Subpart 2234 (1966). Construction of the road was completed on October 27, 1970. The road was later conformed to an ROW under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), and its implementing regulations, 43 C.F.R. Subpart 2800.<sup>4</sup> See 43 C.F.R. § 2807.21(d) (“BLM may modify the [ROW] grant . . . when approving the assignment”).

James Hardie Gypsum, Inc. (then known as JHI Holding, Inc.) (JHG), which had acquired title to the Mine in August 1987, sought an assignment of the ROW from Flintkote on September 24, 1991. See SOR at 2; Answer at 3; ROW Application, dated Sept. 24, 1991 (“Flintkote’s holdings in Blue Diamond, Nevada are now owned and operated by [JHG]”).<sup>5</sup> BLM approved the assignment, by decision dated October 30, 1991, transferring Flintkote’s rights under the ROW to JHG.<sup>6</sup> Gypsum has not offered, and we do not find, any evidence whereby JHG subsequently assigned its rights under the ROW to any other party with BLM’s approval.

On April 15, 2002, JHG transferred title to the Mine, together with all “tenements, hereditaments and appurtenances,” to James Hardie, Inc. (JHI). JHG and JHI then entered into an “Agreement Respecting Continued Mining and Reclamation” (Mining Agreement), whereby JHI leased JHG the Mine, together with the right to continue to undertake mining operations. April 2002 Deed at unp. 3;<sup>7</sup> see

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<sup>4</sup> Section 1 of the 1895 Act, which authorized the Secretary of the Interior to permit the use of the ROW through the public lands for tramroads by any citizen engaged in the business of mining or quarrying, was repealed by section 706(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976), effective Oct. 21, 1976, subject to valid existing ROWs. See 90 Stat. at 2786.

<sup>5</sup> BLM neither disputes nor confirms certain facts asserted by Gypsum, concerning the chain of title to the Mine. See Answer at 2-3.

<sup>6</sup> At the time of the assignment of the ROW to JHG on Oct. 30, 1991, JHG owned the Mine. It thereafter obtained a lease to the Mine from James Hardie, Inc., at the same time as it transferred the Mine to James Hardie, Inc. on Apr. 25, 2002.

<sup>7</sup> JHG also reserved to itself, under the April 2002 Deed, *inter alia*, all buildings, fixtures, personal property, and other improvements located on the Mine, an easement to construct, maintain, and use water pipelines, sewers, and electric, gas, and other utility facilities, over, under, along, and across the Mine, and all water rights appurtenant to the Mine. See April 2002 Deed at unpaginated (unp.) 1-2.

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Mining Agreement at 2. JHI merged with James Hardie (Holdings), Inc. in December 2002, forming James Hardie Building Products, Inc. (JHBP), which succeeded to JHI's interest in the Mine, including the Mining Agreement. *See* SOR at 2. Finally, on March 13, 2003, JHBP transferred title to the Mine, together with all “tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining,” to Gypsum. Deed, dated Mar. 13, 2003, at unp. 1.<sup>8</sup> JHG continued to undertake mining operations on the Mine until 2005, in accordance with the Mining Agreement. *See* SOR at 2.

Gypsum states that BPB purported to relinquish the ROW, together with two other ROWs (NVN-025025 and NVN-025026), by letter dated March 18, 2005, but that, in actuality, they had expired by their own terms on January 1, 2003. *See* SOR at 3 (citing Letter to BLM from BPB, dated Mar. 18, 2005). In its March 18, 2005, letter, received by BLM on March 24, 2005, BPB stated:

This is to advise you that BPB[,] . . . formerly known as [JHG,] . . . has elected to close its Blue Diamond Mine and will cease operations effective midnight, April 25, 2005 (“Closure Date”). Any mining equipment will be removed by the Closure Date.

In connection with this mine closure, BPB is relinquishing the following right of ways effective as of the Closure Date:

1. NEV-025025 (Fold Belt Conveyor)
2. NEV-025026 (Mine Access Road)
3. NEV-065968 (Access Road)

Please advise if BPB has any further obligations in connection with these rights of way.

BLM issued two decisions on January 23, 2012, accepting the relinquishment of the three ROWs (one concerning NVN-025025, and the other concerning NVN-025026

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JHG was referred to as a “wholly-owned subsidiary” of JHI in the Mining Agreement. *See* Mining Agreement at 1.

Gypsum provides a copy of the Apr. 25, 2002, Corrective Grant, Bargain and Sale Deed (Deed) (Ex. B), and a copy of the April 2002 Mining Agreement (Ex. C), attached to its SOR.

<sup>8</sup> Gypsum provides a copy of the Mar. 13, 2003, Deed (Ex. D), attached to its SOR.

and NVN-065968), and closed the ROW files. In closing the files, BLM effectively terminated the ROWs.

Gypsum appealed timely from the Field Manager's January 23, 2012, decision, to the extent that it accepted the relinquishment of, and closed ROW NVN-065968. It contends that BLM erred in accepting the relinquishment, and closing, the ROW at issue, since BPB was not the owner, but only the lessee, of the Mine, to which the ROW was appurtenant, and thus had no authority to relinquish the ROW. It principally asserts:

Because BPB (formerly known as [JHG]), in April 2002, had sold to JHI (which then became BPB's landlord), *all of BPB's interest in the Mine Property including the Right-of-Way*, BPB was without authority to waive or relinquish the rights of its landlord, which in April 2002 was JHI and as of March [1]3, 2003, was Gypsum Resources. Further, nothing in the Mining Agreement granted the tenant [BPB] any authority to sell, transfer, relinquish, or otherwise dispose of the Right-of-Way. [Emphasis added.]

SOR at 3-4; *see id.* at 4 n.7 (“[T]he [ROW] became the property of Gypsum . . . upon the recording of the [Mar. 13, 2003,] deed, and could not have been relinquished by a tenant or the tenant of a prior owner of the land”). Gypsum contends that the March 2005 relinquishment was “ineffective” and, that, BLM's January 23, 2012, acceptance, and closure of the ROW, was “in error.” *Id.* at 4, 5.

Gypsum asks the Board to reverse the Field Manager's January 23, 2012, decision, thus “reinstat[ing] [the ROW], [and] allowing Gypsum . . . to submit *the necessary application for an assignment.*” SOR at 5, emphasis added.

#### *Discussion*

We agree with Gypsum that, at the time of the relinquishment on March 18, 2005, the Mine was owned by Gypsum, and that lessees generally lack authority to waive or relinquish the rights of their lessors. *See* SOR at 3 (citing, *e.g.*, *Long v. Hammond*, 145 P. 527, 528 (Cal. 1914) (“No authority rests in a lessee to sell or otherwise dispose of the lessor's property unless there be express provision therefor in the lease, or unless by fair implication from the terms of the lease such authority may be inferred”)). However, we think this case turns not on the question of who owned the Mine or whether the lessee of the Mine had authority to relinquish the ROW, but rather on *who held the ROW, issued by BLM, at the time of the March 18, 2005, relinquishment.*

It is undisputed that BLM has the discretionary authority, under 43 C.F.R. § 2807.17, to consent to the termination of an ROW when the holder of the ROW requests termination, thus resulting in its termination. See 43 C.F.R. § 2807.17(b) (“A[n] [ROW] grant . . . terminates when . . . BLM consents in writing to [the grant holder’s] request to terminate the grant”); *V. Irene Wallace*, 122 IBLA 349, 353 (1992). The issue here is whether the actual holder of the ROW relinquished the ROW.

Gypsum’s contention that BPB (formerly, JHG) lacked the authority to relinquish the ROW hinges on its assertions regarding the chain of title to the Mine, to which the ROW was an appurtenance, and the related Mining Agreement:

[JHG] transferred all of its right, title and interest *in the [ROW]* to JHI on April 25, 2002, and entered into the Mining Agreement pursuant to which [JHG] became a lessee. Almost eleven months later, JHBP (JHI’s successor-in-interest by merger) sold all of its interest *in the [ROW]* to Gypsum[,] . . . and Gypsum . . . succeeded to JHBP’s interest in the Mining Agreement. [JHG][,] . . . under the name of BPB, submitted the . . . purport[ed] . . . relinquish[ment] [of] the [ROW].

SOR at 3-4. In detailing the chain of title, Gypsum concentrates on the transfers of the Mine, starting with JHG in 1987, and continuing, through successive transfers, from JHG to JHI, by April 25, 2002, deed, from JHI to JHBP, by December 2002 merger, and, finally, from JHBP to Gypsum, by March 13, 2003, deed. It concludes that JHG initially divested itself of its right, title, and interest in Mine, together with the appurtenant ROW, by deed dated April 25, 2002, retaining only a lease interest in conducting mining operations at the Mine. Gypsum, therefore, fails to discern how JHG could relinquish the ROW after April 25, 2002, since it was no longer the owner of the Mine or the appurtenant ROW at that time, only a lessee with no right to divest its lessor of the Mine or its appurtenant ROW.

Under appellant’s theory of the case, Gypsum succeeded to JHG’s interest in the ROW because the ROW necessarily passed along the chain of title with the Mine, from JHG, through JHI/JHBP, to Gypsum. To reach this conclusion, Gypsum relies on its belief that, although not expressly mentioned in the transfers of the Mine, the ROW was an “appurtenance[.]” to the Mine under the applicable deeds. SOR at 2 (quoting Deed, dated Apr. 25, 2002, from JHG to JHI; and Deed, dated Mar. 13, 2003, from JHBP (JHI’s successor-in-interest by merger) to Gypsum).<sup>9</sup>

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<sup>9</sup> Gypsum also asserts that BLM was aware that Gypsum, not BPB, held the ROW, pointing to the fact that BLM had noted, in its Jan. 23, 2012, decision concerning ROW NVN-025025, that, although JHG held other ROWs (NVN-025022 through

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It is true that, as a matter of State law, an ROW may be deemed appurtenant to private property, and thus pass along with transfers or conveyances of that private property. See SOR at 4 n.7 (citing Black's Law Dictionary (9th ed. 2012) (“[A]ppurtenance”)). However, the ROW here represents an interest in public, not private, land. Such an interest cannot simply pass by private deed along with private land to which it is purportedly appurtenant, since BLM must judge whether the transfer is proper. As BLM properly notes, under 43 C.F.R. § 2807.21, an ROW may only be assigned with the approval of BLM, and only after the assignee follows the proper procedure, and BLM determines that the assignee meets all requirements for holding an ROW. See 43 C.F.R. § 2807.21(a) (“With BLM’s approval, you may assign . . . any right or interest in a[n] [ROW] grant”) and (b) (“In order to assign a[n] [ROW] grant, the proposed assignee must file an application and satisfy the same procedures and standards as for a new grant . . . (see [S]ubpart 2804 of [43 C.F.R.] [P]art [2800]”); see also 43 C.F.R. §§ 2803.10, 2804.12, and 2804.14. Moreover, a requested assignment is not effective vis-a-vis the United States until it is approved in writing by BLM. See 43 C.F.R. § 2807.21(d) (“BLM will not recognize an assignment until it approves it in writing. . . . If BLM approves the assignment, the benefits and liabilities of the [ROW] grant apply to the new grant holder.”). Where BLM decides not to approve the assignment, it is clear, as a matter of Federal law, that BLM will not “recognize” the assignment, and the benefits and liabilities of the ROW will not devolve to the assignee.

Accordingly, while an assignment of an ROW issued by BLM may be effective as between private parties, the assignment is not effective against the United States, and establishes no rights under FLPMA and its implementing regulations *until BLM has approved the assignment*. Cf. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 70 (1966) (“The Secretary [of the Interior] . . . must approve all assignments before the [oil and gas] lease obligations [and benefits] or record titles are shifted finally”); *Piute Energy Co.*, 116 IBLA 1, 5 (1990) (assignment of oil and gas lease). Therefore, even if the Mine and its appurtenant ROW passed from JHG to Gypsum, the transfer was not

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NVN-025024), as a matter of record with BLM, the Clark County Assessor listed Gypsum as “the private property owner,” presumably with respect to the “[M]ine” to which the ROW was “related,” stating that, if JHG had changed its name or sold its property rights, JHG must “apply to the BLM for a name change and/or assignment of your [ROW] to the correct or new grant holder[.]” SOR at 4 (quoting BLM Decision, dated Jan. 23, 2012, at unp. 1), emphasis omitted. We find nothing in the BLM decision that could be said to constitute an acknowledgment by BLM “that Gypsum . . . was the private property owner *and, as such, entitled to the [ROWs] appurtenant to the Mine Property.*” *Id.* (emphasis added). At most, BLM indicated it was aware that Gypsum was the private property owner *of the Mine*.



effective vis-a-vis the United States, unless and until BLM approved the assignment of that ROW to Gypsum. See Answer at 5; cf. *McKenzie, Trustee in Bankruptcy v. Irving Trust Co.*, 323 U.S. 365, 369 (1945) (“The provisions of the [Federal] statute governing assignments of claims against the Government [which require the consent of the Government] are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves”); *Devon Energy Corp.*, 145 IBLA 136, 144 (1998) (“The question is *not* what the parties to the assignment intended to assign; the question is what BLM approved when it approved the assignment”).

Gypsum asserts that 43 C.F.R. § 2807.21 does not require BLM to provide “prior approval” of the assignment of an ROW, and does not render “an assignment made without BLM approval . . . void or invalid on its face,” but only provides that, in order to “perfect” the assignment, the assignment must be approved by BLM. Reply at 4. Again, we are not here concerned with whether assignment of the ROW may be effective between the parties without BLM approval, only with whether BLM approved the assignment. Since it did not, pursuant to 43 C.F.R. § 2807.21(a) and (d), JHG was the holder of the ROW at the time of the relinquishment on March 18, 2005, entitling JHG to relinquish and BLM to accept relinquishment of the ROW.

The adjudication of private disputes regarding the validity and effect of assignments of ROWs granted pursuant to Title V of FLPMA is not expressly given to BLM by FLPMA or its implementing regulations. Neither BLM nor this Board has authority to adjudicate matters of State law or to determine the validity and effect of transfers of rights or interests in property as between the private parties. *Thelbert Watts v. United States*, 148 IBLA 213, 220 n.6 (1999) (“The Department has historically declined to adjudicate private disputes involving the validity or effect of the transfer of rights or property[.]”); see also *Wallis v. Pan American Petroleum Corp.*, 384 U.S. at 70 n.8 (citing *McCulloch Oil Corp. of California*, A-30208 (Nov. 25, 1964)); *John L. Stenger*, 170 IBLA 206, 214 (2006) (surface mining on private land); *H. Arvene Cooper v. BLM*, 144 IBLA 44, 47-48 (1998) (ownership of grazing lease base property); *Pat Reed*, 119 IBLA 338, 342-43 (1991) (private dispute regarding oil and gas lease assignment); *Piute Energy Co.*, 116 IBLA at 7 n.10 (“[T]he question of whether an assignment is effective between the parties because of . . . [any] deficiencies is generally not considered a proper area for inquiry by BLM”); *Petrol Resources Corp.*, 65 IBLA 104, 109 (1982) (private dispute regarding oil and gas lease assignment); *John D. Archer*, 46 IBLA 203, 206 (1980) (private dispute regarding phosphate lease assignment).

When BLM becomes aware of a private dispute regarding a pending assignment, it typically maintains the status quo, by deferring action on the assignment until the parties have resolved their dispute by negotiation or litigation. See *Wallis v. Pan American Petroleum Corp.*, 384 U.S. at 70 n.8; *Devon Energy Corp.*, 145 IBLA at 144.

Here, we see no evidence that BLM was informed or otherwise became aware that the ROW might have passed by assignment from JHG through JHI/JHBP, to Gypsum, or that Gypsum claimed to have acquired the ROW by assignment.<sup>10</sup> We, therefore, conclude it was reasonable for BLM to accept the relinquishment of the ROW in its January 2012 decision.

It was the responsibility of JHI, JHBP, and Gypsum, as parties to the April 25, 2002, and March 13, 2003, respective transfers of the Mine, purportedly with the appurtenant ROW, to apply to BLM for approval of the assignment of the ROW. They did not, nor in any other way did they bring the matter to the attention of BLM. The consequences of their failure to do so rest with them, not BLM. *See Piute Energy Co.*, 116 IBLA at 7.

So far as BLM was properly concerned, the ROW was held by JHG/BPB when it was relinquished on March 18, 2005, and, thereafter, at the time of the January 2013 decision.<sup>11</sup> *See* Reply at 3 (“[I]t is accurate that Gypsum . . . had not submitted an assignment application, which was necessary to get the BLM’s approval of the assignment”); Answer at 4 (“At no time did BPB or Appellant ever submit documentation to the BLM informing it that Appellant had purchased BPB’s interest in the ROW. Nor did either party ever submit a request to the BLM for the ROW to be assigned from BPB to Appellant.”), 5 (“There is no evidence in the record to show, nor

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<sup>10</sup> Gypsum argues that BLM is wrong in asserting that there was no evidence demonstrating that Gypsum was the lawful holder of the ROW, at the time of the Mar. 18, 2005, relinquishment, and BLM’s Jan. 23, 2012, acceptance of the relinquishment. *See* Reply at 4-6. The evidence cited by Gypsum, at best, establishes that BLM was aware that Gypsum owned the Mine, and intended to resume mining operations at the Mine.

<sup>11</sup> We also think that the fact that, even despite the successive April 2002 and March 2003 deeds of the Mine, JHG continued to hold, and never transferred, the ROW seems to be confirmed by the fact that, having retained a lease interest in the Mine, for the purpose of conducting mining operations, as well as the other retained rights, at the time of the April 2002 deed, JHG was the party that needed the ROW, as well as these rights, for mining purposes, until it finally ceased such operations in “early 2005.” SOR at 2; *see* Mining Agreement at 2 (“[JHI] hereby leases to [JHG] the Mine Property for the purpose of conducting, at [JHG’s] sole cost and expense, Mining Operations in and on the Mine Property [which include] . . . the right . . . to extract and remove from the Mine Property such ore as [JHG] wishes to remove in its sole discretion”).

does Appellant even allege, that Appellant sought and obtained the requisite approval from the BLM for an assignment of the ROW. Accordingly, there is no evidence to show that Appellant was the lawful holder of the ROW.”<sup>12</sup> BLM correctly indicates that, while all parties in the chain of title to the Mine may have transferred or attempted to transfer the ROW as an appurtenance to the Mine, each transferee was required to seek BLM approval of the assignment of the ROW. Absent such actions, in the eyes of BLM, the ROW remained with JHG, which was thus entitled to relinquish the ROW.

In reply, Gypsum newly argues that this ROW is an “easement appurtenant,” such that it is “incapable of existence separate and apart from the particular . . . land to which it is annexed, there being nothing for it to act on” and, therefore “pass[ed] to [the] subsequent grantee [of the Mine] with the passage of title of the dominant estate.” Reply at 3 (quoting *Smith v. Harris*, 311 P.2d 325, 334 (Kan. 1957) (quoting 28 C.J.S. Easements § 4); and *McWhorter v. The City of Jacksonville, Texas*, 694 S.W.2d 182, 184 (Tex. App. 1985)) (emphasis omitted). Gypsum errs, however, since the ROW at issue does not exist as a private appurtenance to a dominant estate. It is a creature of Federal law, designed to afford the right to use the public land over which it runs to a third party.<sup>13</sup> See 43 C.F.R. §§ 2801.5 (“[A] *right-of-way* means the public lands BLM authorizes a [grant] holder to use or occupy under a grant,” which, in turn, “means any authorization or instrument . . . BLM issues under Title V of [FLPMA] . . . [or BLM issued] before October 21, 1976, under then existing statutory authority”), 2805.14 and 2805.15. The right to use the public land covered by the ROW may or may not provide access to public or private land. Even where the right is so attached to other land, there is no provision in Federal law whereby, when that land is transferred, the ROW necessarily passes to the transferee. At best, Federal law governs the effect of transfers of the land encompassed by *the* ROW, and, even then,

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<sup>12</sup> In referring to BPB, BLM is referencing “James Hardie Gypsum, Inc., dba BPB Gypsum, Inc. (‘BPB’),” or JHG. Answer at 1.

<sup>13</sup> At the time it was granted, the ROW at issue was not an easement, by its terms. See BLM Decision, dated Oct. 1, 1965, at unpag. 2 (“[A] *right-of-way* . . . is hereby granted”); 43 U.S.C. § 956 (1970) (“The Secretary of the Interior is authorized . . . to permit the use of the right of way through the public lands of the United States”); 43 C.F.R. §§ 2234.1-3(a) and 2234.2-3(a)(1)(i) (1966); *Feather River Railway Co.*, 71 I.D. 415, 420 (1964) (ROW granted pursuant to Act of Jan. 21, 1895, creates no interest in the land, being a mere license to use the public lands, revocable at the discretion of the Secretary (citing Regulations for ROWs over Public Lands and Reservations, 36 L.D. 567, 584 (June 6, 1908))).

BLM has discretion whether to permit the transfer of the ROW. See 43 C.F.R. § 2807.15 (BLM “may” transfer land out of Federal ownership either subject to a perpetual ROW or subject to a reservation to the United States of the land encumbered by the perpetual ROW).

We are bound to follow the applicable regulations requiring BLM approval for an assignment of an ROW. Were we to hold that this ROW passed from JHG to JHI and then from JHI/JHBP to Gypsum, “with the passage of title” to the Mine, this would render nugatory the language of 43 C.F.R. § 2807.21(d), providing that a transfer of an ROW is not effective until it has been approved by BLM.<sup>14</sup> Reply at 3 (quoting *McWhorter v. The City of Jacksonville, Texas*, 694 S.W.2d at 184). We lack the authority to declare, either explicitly or implicitly, a duly promulgated regulation of the Department null and void. See, e.g., *Alamo Ranch Co., Inc.*, 135 IBLA 61, 69, 71 (1996).

Fundamentally, all that properly concerned BLM at the time of the March 2005 ROW relinquishment, and thereafter, was who held the ROW, as a matter of record with BLM.<sup>15</sup> Cf. *Vulcan Power Co.*, 143 IBLA 10, 22 (1998) (“The Board has frequently recognized that BLM may rely upon record title in making decisions concerning leases. See, e.g., *Piute Energy Co.*, 116 IBLA 1, 6 (1990).”); *Alminex USA, Inc.*, 55 IBLA 315, 317 (1981) (BLM properly disapproved oil and gas lease assignment where lease not held, as a matter of record with BLM, by assignee). The evidence of record and offered by the appellant only establishes that Flintkote assigned its rights in the ROW to JHG, with BLM’s approval, on October 30, 1991, and that JHG, which had become BPB, thereafter relinquished the ROW on March 18, 2005. So far as BLM was properly concerned, BPB, which had succeeded to JHG, had the “authority to relinquish the [ROW].” SOR at 3 (emphasis omitted); see *id.* at 4 (“BPB (formerly known as [JHG])”); Answer at 4 (“With no documentation before it to suggest that BPB was not the lawful holder of the

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<sup>14</sup> Gypsum maintains that it was, at least, the “equitable owner” of the ROW at the time of JHG/BPB’s Mar. 18, 2005, relinquishment of the ROW, and thereafter, which thus precluded JHG/BPB from relinquishing, or BLM from accepting the relinquishment of, the ROW. Reply at 4 (citing *Snell v. Hill*, 105 N.E. 16, 19 (Ill. 1914)). Even assuming that Gypsum had an equitable interest in the ROW, absent BLM’s approval of the assignment, the transfer of the ROW to Gypsum was not effective vis-a-vis the United States, under 43 C.F.R. § 2807.21(d). Indeed, that rule pertains even where, as between the private parties, the assignee holds the legal interest in the ROW.

<sup>15</sup> We note that Gypsum clearly recognizes the necessity for BLM, even despite the Mar. 13, 2003, deed of the Mine, and purportedly the appurtenant ROW, from JHI/JHBP to Gypsum, to approve an “assignment” of the ROW to Gypsum. SOR at 5.

ROW grant, on January 23, 2012, the BLM issued a decision accepting BPB's relinquishment of the ROW, thereby officially terminating the ROW").

We, therefore, find no error in BLM's decision to accept the relinquishment of and to close ROW NVN-065968. *Cf. J.M. Dunbar*, 62 IBLA 119, 121-22 (1982) (citing *James S. Holmberg*, 67 I.D. 302, 304 (1960)) (Assignor may, after filing an assignment, but prior to its approval, relinquish an oil and gas lease, even over the objection of the assignee). Under these circumstances, we will maintain the current status quo.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Jackson  
Administrative Judge